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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 26

ABRAHAM C. BERMAN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 37–39) is reported in 88 F. (2d) 645.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 8, 1937 (R. 39). The petition for writ of certiorari was filed April 12, 1937, and granted May 17, 1937 (R. 44). The jurisdiction of this Court to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by

the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the petitioner's first sentence, even though it imposed a definite term of imprisonment, was not a final and therefore not an appealable judgment because execution of the sentence was suspended and the petitioner placed on probation.

2. Whether the petitioner's second sentence, insofar as it imposed a fine in addition to the original sentence, was in effect a consent judgment, the fine having been entered at the request of the petitioner in order that he might have a valid appeal in the event his first sentence should be held not to be appealable.

STATUTES AND RULES INVOLVED

The pertinent statutes and the material provisions of the Criminal Appeals Rules, promulgated by this Court May 7, 1934, are printed in the Appendix to the petitioner's brief, pages 32–39.

STATEMENT

On December 23, 1936, the petitioner was found guilty by a jury in the District Court of the United States for the Southern District of New York upon 19 counts of an indictment charging the use of the mails in furtherance of a scheme to defraud, in violation of U. S. C., Title 18, Sec. 338, and of conspiring to commit that offense, in violation of U. S. C., Title 18, Sec. 88 (R. 8, 30, 34).

On December 29, 1936, the petitioner was sentenced on each count to a year and a day, the terms of imprisonment to run concurrently.[1] Execution of the sentence was, however, suspended and the defendant placed on probation for a period of two years (R. 11, 30–31, 34). On December 30, 1936, the petitioner filed in the District Court a notice of appeal to the Circuit Court of Appeals for the Second Circuit (R. 1–2, 25, 34), and a duplicate of this notice was transmitted to the Circuit Court of Appeals on December 31, 1936 (R. 13).

On January 28, 1937, the petitioner, being uncertain as to whether an appeal would lie from a sentence the execution of which had been suspended, made an application to the District Court that he be resentenced in order to avoid any doubt as to his right to appeal. He requested that in resentencing him the court include a fine of $1 on each count upon which he had been convicted. The United States Attorney opposed the application on the ground that since an appeal was already pending before the Circuit Court of Appeals, the District Court had lost jurisdiction to resentence the petitioner. He also argued that the appeal should first be withdrawn pursuant to an order of the Circuit Court of Appeals and the previous sentence vacated before the imposition of a new one. The petitioner requested, however, that the court resentence him

[1] The record discloses that the petitioner is a lawyer (R. 41), and his brief states that he has been disbarred in consequence of his conviction (p. 3).

without requiring him to withdraw the pending appeal and without vacating the previous sentence, in order that if one of the appeals were dismissed he might still have an appeal pending. The District Court then reimposed the prior sentence, adding thereto a fine of $1 on each of the counts upon which the petitioner had been convicted. Execution of the payment of the fine was stayed pending appeal. The court refrained, in accordance with the request of the petitioner, from vacating the prior sentence (R. 35–37, 40–44). On February 1, 1937, the petitioner filed in the District Court a notice of appeal from the second sentence (R. 13–14, 29, 32, 35).

On February 2, 1937, the petitioner moved in the Circuit Court of Appeals for a consolidation of his two appeals (R. 29–32). On February 5, 1937, the Government filed a motion in the Circuit Court of Appeals for an order dismissing the first appeal, because it was from a suspended sentence; or, in the alternative, for an order vacating the judgment of the District Court resentencing the petitioner and dismissing the appeal from this judgment, because the District Court lacked jurisdiction to enter such judgment (R. 33–37).

The Circuit Court of Appeals in its opinion (R. 37–39) held that the first sentence was interlocutory because of the suspension of its execution; and that for this reason, if the second sentence did not vacate it, the appeal therefrom must

be dismissed under the authority of its decisions in *United States* v. *Lecato,* 29 F. (2d) 694, and other cases.

With reference to the second sentence, the court assumed that the appeal from the first sentence was a nullity; that in consequence the District Court had power to resentence the defendant; and that it could, at the defendant's request, add to the sentence by imposing a fine of $1 on each count. The court held, however, that the defendant could not complain of this part of the judgment because he not only consented to it, but actually asked for it, and that in a Federal court it is not the practice in such cases to dismiss the appeal, but to affirm the judgment without consideration of the merits of the appeal. It accordingly affirmed the judgment in so far as it imposed the fine.

The court further held with reference to the second sentence (R. 38–39):

> Literally it [the second sentence] reimposed the sentence of imprisonment, and again suspended sentence; thus leaving two sentences outstanding. If it be construed as not vacating the first judgment, it is clearly invalid and must be reversed; if it be construed to vacate the first, as we assume, it is not appealable, because it was not an incident to the imposition of the fine and so reviewable along with it. It was concurrent and independent, and since it was interlocutory taken alone, the appeal must be *pro tanto* dismissed. Finally, if the second sen-

tence be treated as vacating the first, the appeal from the first must nevertheless be dismissed; though in that event because there was not judgment from which to appeal.

In accordance with its opinion the Circuit Court of Appeals entered judgment dismissing the appeal from the first sentence; affirming the judgment imposing the fine; and dismissing the appeal from the second sentence of imprisonment (R. 39).

SUMMARY OF ARGUMENT

1. The first sentence imposed upon the petitioner on December 29, 1936, was, in our opinion, a final and therefore an appealable judgment. It completely disposed of the merits of the litigation between the parties and thus met the test of finality for appeal purposes expressly sanctioned by the decisions of this Court. Suspension of the execution of sentence was granted solely to accomplish the humane and beneficent purposes of the Probation Act and not for the purpose of permitting any reconsideration of the merits of the case. Nor is its finality for appeal purposes destroyed because the District Court retains such control over the sentence that another order is required to carry it into execution or because the District Court, if probation should be revoked, may enter a new and different sentence. The considerations governing such action of the District Court are analogous to those which motivated it in granting probation. No reexamination of the merits of the litigation is involved.

Cases holding that no appeal will lie where imposition of sentence has been suspended under the Probation Act are obviously not in point because in such cases no sentence or judgment has been pronounced by the District Court.

2. If, as the Circuit Court of Appeals held, the first sentence was interlocutory, we believe that court was wrong in concluding that the second sentence, pronounced on January 28, 1937, was a consent judgment, insofar as it imposed a fine, because the petitioner requested the imposition of such fine, and that the petitioner was therefore precluded from review of the merits of his appeal from that judgment. The distinguishing feature of the cases relied upon by the court below is that in those cases the party assailing the judgment had acquiesced in the determination adverse to him of the legal and factual issues covered by the judgment, whereas in the instant case the petitioner, as is pointed out by him, "at no time indicated acquiescence in the central issue of the case, i. e., his guilt or the correctness of the proceedings in the district court", the fine being imposed at his request solely to protect his right to appeal and to secure a review of his conviction in the event the first sentence should be held to be non-appealable.

3. While we cannot support the decision of the Circuit Court of Appeals with respect to the two principal questions here involved, we do not, out of deference to the views of that court, confess error but submit the case for decision by this Court.

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ARGUMENT

I

THE FIRST SENTENCE IMPOSED UPON THE PETITIONER WAS, IN OUR VIEW, A FINAL AND, THEREFORE, AN APPEALABLE JUDGMENT

It cannot be disputed, of course, that a defendant has no right of appeal to a Circuit Court of Appeals in a criminal case unless there has been a final judgment. *Cogen* v. *United States,* 278 U. S. 221; *Heike* v. *United States,* 217 U. S. 423; Sec. 128 (a), Judicial Code as amended (Pet. Br. 32). There is nothing in the Criminal Appeals Rules, promulgated by this Court on May 7, 1934, which may be construed as granting appellate jurisdiction to review interlocutory orders in such cases.[2]

The principal question presented by the decision of the Circuit Court of Appeals is whether there is a final and, therefore, an appealable judgment where a definite sentence has been pronounced in a criminal case, but execution thereof has been suspended and the defendant placed upon probation. This question arises with reference to

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[2] The Act of March 8, 1934, c. 49, 48 Stat. 399, U. S. C. Title 28, Sec. 723a, pursuant to which the Criminal Appeals Rules were promulgated, provides that:

"SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed."

the first sentence imposed upon the petitioner, on December 29, 1936.

It is settled by the decisions of this Court that in a criminal case the sentence is the final judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464. This view is fortified by the Criminal Appeals Rules (Rule II, par. 3; Rule III, par. 1). Following this principle the Circuit Court of Appeals for the Second Circuit in a line of decisions, of which *United States* v. *Lecato,* 29 F. (2d) 694, is the leading case, held that where *imposition* of sentence has been suspended an appeal will not lie.[3] As the *ratio decidendi* of these decisions is, of course, that where a sentence has not been pronounced there is no final judgment from which to appeal, it is evident that these decisions do not apply in the present case, where there was a sentence imposed.

Although a sentence was imposed in the instant case, the Circuit Court of Appeals held that it was interlocutory because its execution was suspended. While the court apparently concedes that stay of execution of a sentence "until the happening of

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[3] See also the following decisions of the Circuit Court of Appeals for the Second Circuit: *United States* v. *Messina,* 36 F. (2d) 699; *United States* v. *Levinson,* 54 F. (2d) 363; *United States* v. *Knickerbocker Fur Coat Co.,* 66 F. (2d) 388. A similar decision was rendered by the Circuit Court of Appeals for the Ninth Circuit in *Starklof* v. *United States,* 20 F. (2d) 32, 33. The Circuit Court of Appeals in its opinion in the *Lecato* case refers to a number of State decisions sustaining this view (p. 695).

some event over which the judge has no control, like the termination of an appeal, or the occurrence of some outside condition" would not destroy finality of the sentence for appeal purposes, it held that where the suspension of execution is incident to the placing of the defendant upon probation, there is not merely a stay of execution; that "The court has never finally disposed of the case at all; the sentence though definite, remains conditional; not only may it never be executed but its execution depends upon another decision of the judge. Indeed, its very length may be reduced during the period of probation. *United States* v. *Antinori,* 59 F. (2) 171 (C. C. A. 5)." For these reasons apparently the court was of the view that there was no substantial difference between the situation where, as in the instant case, sentence was imposed but its *execution* suspended and the defendant placed upon probation and the situation where, as in the *Lecato* case, *imposition* of sentence was suspended and the defendants placed upon probation. In this connection it said that "Perhaps it is desirable that a man, convicted and put upon probation, should be able to review the trial, but if he may not do so when no sentence is imposed, he may not, when nothing more has been done than fix the maximum punishment he must undergo, if it ever be decided to punish him at all." (R. 35–36.)

From this analysis of the decision of the Circuit Court of Appeals it would appear that there are

two factors which underlie the holding that the sentence imposed upon the petitioner on December 29, 1936, was not a final judgment: (1) that the sentence might never be carried into execution, and (2) that the District Court retained such control over its sentence that another decision of the court was needed to carry the sentence into execution, and that the District Court could, upon revoking probation, enter a new and different sentence.[4]

While the reasoning of the Circuit Court of Appeals is persuasive, we do not believe that either of the considerations to which the court refers is of any materiality in determining whether the sentence was a final and therefore an appealable judgment.

The criterion for determining whether a judgment is final for appeal purposes was thus stated by this Court in *Beebe* v. *Russell*, 19 How. 283, 285:

> When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that

[4] While it is clear that where the execution of sentence has been suspended and the defendant placed on probation, the court upon revocation of probation may order the sentence originally imposed carried into execution or may reduce the sentence (*United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5th)), it is open to doubt whether it may increase the sentence originally imposed. See Section 2 of the Probation Act (U. S. C., Title 18, Sec. 725; Pet. Br. 36–37), but cf. *United States* v. *Antinori*, *supra* (p. 172); 36 Op. A. G. 186, 191–192; *United States* v. *Benz*, 282 U. S. 304, 307.

> it will not be necessary to bring the cause again before the court for its final decision, it is a final decree.

See also *Heike* v. *United States*, 217 U. S. 423, 429, *supra*.

In the instant case a verdict was returned against the petitioner by the jury and that was confirmed by the sentence or judgment of the trial court. Nothing was left for determination on the merits. The suspension of execution of the sentence was not for the purpose of permitting any reconsideration of the merits of the litigation. It was granted under the Probation Act to permit the accomplishment of the beneficient and humane purposes of that statute. Execution of sentence may be suspended and the defendant placed upon probation only where "the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby." (Section 1 of the Probation Act, Pet. Br., p. 36.) The object of the statute, as was pointed out by this Court in *United States* v. *Murray*, 275 U. S. 347, 358, "is the attempted saving of a man who has taken one wrong step and whom the judge thinks to be a brand who can be plucked from the burning at the time of the imposition of the sentence." A suspension of execution of sentence for such purpose obviously presents considerations entirely foreign to any reexamination of the merits of the litigation. Cf. *Ex parte United States*, 242 U. S. 27.

As was pointed out in *United States* v. *Gargano*, 25 F. (2d) 723 (E. D. La.), a suspension of execution of sentence granted for the purpose of accomplishing the aims and objects of the Probation Act flows from a source entirely separate and different from that under which the court acts when it pronounces sentence. The court said (p. 724):

> In several of the opinions there seems an inclination to the view that the action of the trial court in suspending the execution of a sentence or judgment is part of the sentence and not separable. The contrary view seems more nearly correct. The sentence is imposed according to the penal statute under which the conviction is had, and is a judicial function flowing directly from the statute under which the criminal proceeding is brought; whereas the duties imposed by the Probation Act are of rather an auxiliary or ancillary character, sui generis in nature. These constitute a judicial function only by virtue of the legislative authority which Congress vested separately in the court, and which might well have been vested in some executive officer, board, bureau, or commission.

As a suspension of execution of sentence under the Probation Act is not granted for the purpose of securing any reconsideration of the merits of the litigation, it cannot, of course, be regarded as setting aside or in anywise altering the sentence or

judgment pronounced by the District Court. As was said in *Kriebel* v. *United States*, 10 F. (2d) 762, 764 (C. C. A. 7th):

> Relying on *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. Ed. 129, holding that the court cannot set aside or alter its judgment after the expiration of the term at which it is entered, the defendant in error argues that to suspend the execution of a sentence is to set aside or alter the sentence. This seems to have been conceded in *Nix* v. *James, supra* [7 F. (2d) 590]. We cannot agree to this. It has never been contended that the statute providing for the release from jail of a poor convict imprisoned for nonpayment of a fine or fine and costs provided a method for setting aside or altering the judgment. It is only a way of relieving from further service under the sentence. Nor has the Parole Act been held to have this effect. * * *

The court accordingly held that the District Court, after the expiration of the term at which a sentence was rendered and after appellate proceedings had been concluded, could entertain a petition to suspend the execution of the sentence and place the defendant on probation.

As it would seem apparent therefore that a suspension of execution of sentence under the Probation Act is conditioned upon considerations which have no relationship to a reexamination of the merits of the litigation, it is difficult to escape the conclusion that such a suspension of execution, in

so far as its legal effect is concerned, differs in no essential respect from that which was involved in the decision of this Court in *United States* v. *Pile*, 130 U. S. 280. In that case there was a suspension of the execution of a judgment in a criminal case until the next term of court, unaccompanied by any pending motion for a rehearing or modification of the judgment or other proceeding taken at the term of court when the judgment was rendered. This Court held that despite the suspension of the execution of the sentence, the judgment remained in full force and that the trial court was without further jurisdiction of the case. The Court said (pp. 282–283):

> When the Circuit Court had entered its judgment against the defendant for an imprisonment of three months and a fine of $250, and had overruled the motion in arrest of judgment and for a new trial, it had finally disposed of the case. No new motion was made at that term of the court for any farther consideration of the matter, and the judgment thus entered was final. It is true that the court made an order, upon the application of the defendant, by which the execution of that judgment was suspended until the fourth Monday in November, which was during the same term, and that on the 24th of November another order was entered still farther suspending its execution until the next term of the court. But we do not consider that this order for the

> suspension of such execution set the judgment aside or was founded on any further motion to reconsider that judgment. Although the mere execution of it was suspended until the next term of the court the judgment remained in full force, with no proceeding pending to rehear, reconsider, or modify it.

See also 36 Op. A. G. 186.

Nor would it seem to be material insofar as the finality of the sentence for appeal purposes is concerned that the District Court retains such control over its sentence that another order of that court is required to carry it into execution,[5] or that the District Court may enter a different sentence if it should revoke probation. The considerations which would govern the court's action in these respects are analogous to those which motivated it when it suspended execution of the sentence and granted probation. Probation is revoked and the original or a new sentence carried into execution solely because the defendant, by his conduct, has breached the trust reposed in him by the District Court and has shown himself no longer worthy of receiving the benefits accorded him under the Probation Act. No reconsideration of the merits of the litigation is involved in the action of the court when it revokes probation, and an appeal

[5] The Circuit Court of Appeals undoubtedly had in mind an order revoking probation and requiring that the sentence originally imposed be carried into execution.

from such an order involves only the question whether there has been an abuse of discretion in revoking probation. *Burns* v. *United States,* 287 U. S. 216, 222; *Escoe* v. *Zerbst,* 295 U. S. 490, 493. Control is retained by the District Court over the sentence solely to accomplish the objects and purposes of the probation statute. As was pointed out by this Court in the *Burns* case (p. 222):

> [The defendant while on probation] is still a person convicted of an offense, and the suspension of his sentence remains within the control of the court. The continuance of that control, apparent from the terms of the statute, is essential to the accomplishment of its beneficent purpose, as otherwise probation might be more reluctantly granted or, when granted, might be made the occasion of delays and obstruction which would bring reproach upon the administration of justice.

As the control which the court retains over its sentence under the Probation Act involves considerations which have no conceivable relationship to a reconsideration of the merits of the litigation, it is difficult to see how the retention of such control affects the finality of the sentence for appeal purposes. If such retention of control over a sentence destroys its finality, it would seem to follow that no criminal judgment pronounced by a District Court could ever be regarded as final when rendered, for this Court has held in *United States* v.

Benz, 282 U. S. 304, that a District Court has the power at any time during the term at which a sentence was rendered to modify it, at least to the extent of reducing it, even though the defendant has been committed and entered upon the service of his sentence.

While the Probation Act permits retention of control by a District Court over its sentence, irrespective of terms of court, in order to subserve the manifest purpose of that statute, we have found nothing, either in the legislative history of the Probation Act or otherwise, which would warrant the conclusion that that statute has any bearing upon the appealability as a final judgment of the sentence pronounced.

The court below was undoubtedly largely influenced in its decision by its holdings in *United States* v. *Lecato, supra,* and other cases that a defendant who has been placed upon probation following the suspension of the *imposition* of sentence could not appeal. But the court itself pointed out the distinction between such a situation and that presented in the instant case, where sentence was imposed and execution merely suspended as an incident to the granting of probation, when it said in the *Lecato* case (p. 695):

> The appeal from the suspension of sentence was premature. *The only judgment in a criminal prosecution is the sentence, and when sentence is suspended there is no judgment from which to appeal.* * * *

> * * * nor is there any serious injustice involved; a defendant may at any time insist upon the imposition of sentence, if so minded and if he prefers to remain under probation rather than to take his chances, no grave evil results. At any rate, if it be thought desirable that he should have an appeal, the law is too well settled for us to change it. [Italics ours.]

In other words, the difference between the situation presented in this and the *Lecato* cases is simply that here there was a judgment of the court—a sentence (Cf. *United States* v. *Long Branch Distilling Co.*, 262 Fed. 768 (C. C. A. 5th)). This sentence being a final judgment the petitioner was entitled to appeal under the express authority granted in Section 128 (a) of the Judicial Code (Pet. Br. 32).

Our view as to the appealability of the sentence pronounced on the petitioner on December 29, 1936, the first sentence, is fortified by the state decisions, which have uniformly held where the question has been raised under state probation laws, that an appeal will lie where sentence is imposed but its execution is suspended and the defendant placed on probation. See *State* v. *Lillopoulos*, 165 Wash. 197; *State* v. *Hall*, 173 Wash. 188; *Pritchett* v. *State*, 140 Md. 310; *Sutton* v. *State*, 194 Ind. 479; *Mariano* v. *Hibbard*, 243 Mass. 90.

Various other considerations supporting the view that the first sentence imposed on the prisoner

was appealable are presented in the brief for the petitioner.

Cornerz v. *United States,* 69 F. (2d) 965 (C. C. A. 5th), while containing language which might be construed as supporting the decision of the court below, did not pass upon the question here presented. Indeed, the court seems to have recognized that there might be a distinction, from the standpoint of appeal, between a case where under the Probation Act sentence was imposed and its execution suspended and a case where there has been no imposition of sentence. On the point decided, the decision in the *Cornerz* case is contrary to that in *United States ex rel. Vorhees* v. *Hill,* 6 F. Supp. 922 (M. D. Pa.), which, in the light of the principles heretofore stated, would appear to be the better reasoned decision.

If, as we believe, the first sentence was a final judgment, the appeal therefrom was clearly valid, and the District Court was obviously without power during the pendency of such appeal to alter, revise, or modify its judgment by resentencing the petitioner. *United States* v. *Habib,* 72 F. (2d) 271 (C. C. A. 2d), and cases cited. See also the additional cases cited by the petitioner at page 8 of his brief. Under these circumstances it is clear that the second sentence imposed on the petitioner on January 28, 1937, would be a nullity.

II

IF THE FIRST SENTENCE WAS NOT APPEALABLE, IT IS OUR VIEW THAT THE SECOND SENTENCE IS NOT A CONSENT JUDGMENT INSOFAR AS IT IMPOSED A FINE ON THE PETITIONER, AND THAT THE PETITIONER UPON AN APPEAL THEREFROM WAS ENTITLED TO A REVIEW OF THE MERITS OF THE APPEAL

After holding that the first sentence was interlocutory, the Circuit Court of Appeals proceeded to a consideration of the reviewability of the second sentence imposed on the petitioner on January 28, 1937. It assumed that the appeal from the first sentence was a nullity; that in consequence the District Court had power to resentence the petitioner; and that it could, at the petitioner's request, validly add to the prior sentence by imposing a fine of one dollar on each count.[6] It held, however,

[6] We think that the Circuit Court of Appeals was correct in its assumptions if it was right in holding that the first sentence was not an appealable judgment. If that sentence was interlocutory, as the court held, the District Court clearly had the power to proceed to the rendition of a final judgment (cf. *Miller* v. *Aderhold*, 288 U. S. 206, *supra*), and the second sentence would consequently supersede the first sentence. Moreover, it is apparent that the District Court did not intend that the first sentence should stand if it was not appealable. Its purpose in resentencing the petitioner was manifestly to make sure that there was an appealable judgment if the first sentence was not appealable. It would seem to follow, therefore, that if the Circuit Court of Appeals correctly held that the first sentence was not an appealable judgment, it was further correct in assuming that the second sentence vacated the first. (R. 38.) We therefore deem it unnecessary to discuss what the court's action should have been if the first sentence was not vacated by the second one, "leaving two sentences outstanding."

that insofar as the second sentence imposed a fine upon the petitioner, there was, in effect, a consent judgment because the petitioner had requested the imposition of the fine. The court consequently concluded that although the second sentence was in this respect appealable, review could not be had of the merits of the petitioner's appeal from this sentence under the practice obtaining in the Federal courts in respect of consent judgments.[7]

In holding that the second sentence, insofar as it imposed the fine, was in effect a consent judgment, the court relied upon a line of decisions by this and

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[7] Insofar as the second sentence reimposed the first, the Circuit Court of Appeals held that the appeal must be dismissed *pro tanto* upon the same ground that it dismissed the appeal from the first sentence. If the court was correct in its holding as to the first sentence, it would seem to follow that it was correct in its holding as to the identical portion of the second sentence. That portion of the sentence could obviously not serve as a basis for appeal. The second sentence became appealable only because the imposition of the fine made it a final judgment. If the fine had not been requested by the petitioner, the Circuit Court of Appeals would unquestionably have reviewed the merits of the petitioner's appeal and ordered a reversal of his conviction if it found error. There would seem to be, therefore, no basis for the view of the petitioner that under the decision of the Circuit Court of Appeals the second sentence became, in effect, a dual judgment and that the result of that decision would be that where there has been imposed a prison sentence and a fine upon the defendant, and execution of the prison sentence has been suspended under the Probation Act, the defendant would nevertheless be required to remain on probation even though on appeal there was held to be reversible error, the defendant being relieved only of the payment of the fine (Pet. Br. 18).

other courts in civil cases (R. 38), the distinguishing feature of which is that the party assailing the judgment had acquiesced in the determination adverse to him of the legal and factual issues covered by the judgment. The crucial difference between these cases and the present case is, we think, aptly pointed out by the petitioner in his brief when he says (p. 29):

> the petitioner at no time indicated acquiescence in the central issue of the case, i. e., his guilt or the correctness of the proceedings in the district court. Rather, he complained of the first sentence because it was in such form as possibly to deprive him of the right to a review of the proceedings in the trial court culminating in a judgment of conviction. While he sought modification of the first judgment, he did so only to make more certain his right to have his conviction set aside. Nor was his intention undisclosed; trial judge and prosecutor were fully informed. The trial judge, sharing the petitioner's fears and desiring to assure the right of appeal, resentenced him, again suspending execution of imprisonment and placing him on probation, and imposing a fine.

While we have found no case precisely in point, the petitioner cites several decisions which lend support to his view (Pet. Br. 30–31).

It therefore follows that it is our view that if the Circuit Court of Appeals was correct in holding

the first sentence was not an appealable judgment, it was wrong in concluding that the second sentence, insofar as it imposed a fine upon the petitioner, was a consent judgment and that the petitioner was in consequence precluded from a review of the merits of his appeal from that judgment.

CONCLUSION

While we are unable to support the decision of the Circuit Court of Appeals upon the two principal questions involved in the instant case, in deference to the views of that court we do not formally confess error, but submit the case for the decision of this Court. Cf. *Taylor* v. *United States*, 286 U. S. 1, 5.

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SUPREME COURT OF THE UNITED STATES.

No. 26.—October Term, 1937.

Abraham C. Berman, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 6, 1937.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

On conviction upon an indictment containing several counts for using the mails to defraud (18 U. S. C. 338) and for conspiracy to that end (18 U. S. C. 88), petitioner was sentenced on each count to serve a year and a day, the terms of imprisonment to run concurrently. Execution of the sentence was suspended and petitioner was placed on probation for two years. Petitioner appealed from the sentence.

While the appeal was pending and without its withdrawal, petitioner fearing its dismissal applied to the District Court for resentence. That court reimposed the prior sentence of imprisonment, again suspending its execution, and added a fine of one dollar upon each count. The court did not vacate the prior sentence. Petitioner then appealed from the second sentence.

The Circuit Court of Appeals held that, by reason of suspension of its execution, the first sentence was interlocutory and dismissed the first appeal. Assuming that appeal to be a nullity, the Court of Appeals thought that the District Court had power to resentence; that petitioner could not complain of the fine as it was imposed at his request; and that the second sentence of imprisonment, if taken alone, was interlocutory. The judgment imposing the fine was affirmed and the appeal from the second sentence of imprisonment was dismissed. 88 F. (2d) 645.

We are of the opinion that the Court of Appeals erred in dismissing the first appeal as interlocutory. Petitioner was convicted and

sentenced. Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller* v. *Aderhold,* 288 U. S. 206, 210; *Hill* v. *Wampler,* 298 U. S. 460, 464. Here, the imposition of the sentence was not suspended, but only its execution. The sentence was not vacated. It stood as a final determination of the merits of the criminal charge. To create finality it was necessary that petitioner's conviction should be followed by sentence (*Hill* v. *Wampler, supra*) but when so followed the finality of the judgment was not lost because execution was suspended. In criminal cases, as well as civil, the judgment is final for the purpose of appeal "when it terminates the litigation on the merits" and "leaves nothing to be done but to enforce by execution what has been determined". *St. Louis, Iron Mountain & S. R. R. Co.* v. *Southern Express Co.,* 108 U. S. 24, 28; *United States* v. *Pile,* 130 U. S. 280, 283; *Heike* v. *United States,* 217 U. S. 423, 429.

Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. The record discloses that petitioner is a lawyer and by reason of his conviction his license was subject to revocation (and petitioner says that he has been disbarred) without inquiry into his guilt or innocence. *Matter of Ackerman,* 218 App. Div. (N. Y.) 388, 392. His civil rights may be determined solely by reference to the judgment.

Placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence "comes as an act of grace to one convicted of a crime". *Escoe* v. *Zerbst,* 295 U. S. 490, 492, 493. The considerations it involves are entirely apart from any reexamination of the merits of the litigation. Probation was designed "to aid the rehabilitation of a penitent offender"; "to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable". Thus probation cannot be demanded as a right. "The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain". *Burns* v. *United States,* 287 U. S. 216, 220. But if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication.

As the first sentence was a final judgment and appeal therefrom was properly taken, the District Court was without jurisdiction during the pendency of that appeal to modify its judgment by resentencing the prisoner. *Draper* v. *Davis,* 102 U. S. 370, 371; *Keyser* v. *Farr,* 105 U. S. 265, 266; *Spirou* v. *United States,* 24 F. (2d) 796, 797; *United States* v. *Radice,* 40 F. (2d) 445, 446; *United States* v. *Habib,* 72 F. (2d) 271.

The judgment of the Circuit Court of Appeals is reversed so far as it dismissed the first appeal and affirmed the later judgment imposing the fine, and the cause is remanded to that court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.